Newsletter of the Utah Prosecution Council

The PROSECUTOR

RECENT CASES

Utah Supreme Court

Confession Obtained Using Defendant's Children Not Coerced
A female victim was found dead in her apartment with two gunshots to the head. While investigators were on the scene defendant's wife and victim's boyfriend arrived. The wife told police that the victim's boyfriend had kidnapped her and her two daughters. The boyfriend suspected defendant had killed his girlfriend.

Police interrogated defendant for many hours using two different officers and employing many persuasive techniques. One of the techniques used during defendant's interrogations was appealing to defendant's love for his children. The officer asked defendant ever wanted to see his children again. Another officer told defendant if he confessed he could be proud and tell his children he told the truth and that the officer could "bring resources there so that [your daughters] can be educated and break the cycle here."

Defendant moved to suppress the confession claiming it was coerced. The district court granted the motion to suppress "based on [t]he detectives' invocation of Mr. Arriaga-Luna's children as a method to get a confession." The State appealed the district court's ruling.

The Supreme Court held defendant's confession was not coerced when looking at the totality of the circumstances. Also, the court held the officer's communicated factual situations where defendant might not ever see his children again, but defendant did not confess. This shows that during that interview, where the technique was used, defendant's will was not overcome by the technique. During a second interview, the technique was used again when the officer said he "could bring resources." However, the Supreme Court held this wasn't improper because the officer did not offer to bring resources in exchange for a confession, but rather as a response to defendant's questions about what would happen to his children. Also, the comments about his daughters respecting defendant for confessing were permissible because it was an appeal to his sense of personal dignity and responsibility, which is not seen as coercive. *State v. Arriaga-Luna*, 2013 UT 56

Officer Termination For Intoxication Upheld
Sunset City Police Department fired Officer Steward Becker for reporting for duty under the influence of alcohol.

Continued on page 3

In This Issue:

Case Summary Index

Continued from page 1

Officer Becker finished a shift at 6:00 a.m. and was scheduled to report back for duty at 2:00 p.m. later that day. When he arrived for work that afternoon he discussed the shift change with his supervisor Sgt. Arbogast. The Sergeant immediately noticed a strong order of alcohol coming from Becker. Becker admitted he had multiple shots of alcohol that morning before going to bed around 8:00 a.m. The Sergeant requested Becker blow into a PBT and Mr. Becker offered to use his own because he knew it was "pretty accurate." When he blew into the PBT it showed a breath alcohol content of .045 grams.

About the same time some Utah State Troopers were at the office to update the clock on the intoxilyzer machine. The troopers noticed the alcohol coming from Becker. The troopers offered to the sergeant to perform field sobriety tests on Becker. The sergeant declined and called the Chief. Becker was subsequently fired for reporting for duty with a blood alcohol level of .045.

Becker appealed the Sunset City Board of Appeals upholding of his termination. The Utah Supreme Court held, the "evidence to be substantial because it constitutes "a quantum and quality of relevant evidence that is adequate to convince a reasonable mind" that Mr. Becker reported for duty with a blood alcohol content of .04 grams or greater. *Stewart Becker v. Sunset City*, 2013 UT 51

Title Of Referendum Upheld As Impartial

Orem City Council received the tentative budget for the fiscal year 2012-2013. The City Manger recommended a tax increase to meet the revenues that were necessary for the proposed budget. The City Council held meetings, open to the public, to receive feedback about the new budget. Many were unhappy with the tax increase, specifically to pay for a technology program named UTOPIA. The City Council approved the budget and tax increase, but in a smaller amount than when originally proposed. Petitioners filed a Referendum challenging the property tax rate and levy. Petitioners followed the process correctly and a referendum was to be on the ballot. However, the City Attorney chose the title for the Referendum on the ballot and petitioners were unhappy with the chosen title. Petitioners filed for extraordinary relief challenging the title.

The language for the ballot was as follows: On August 15, 2012, the Orem City Council passed Resolution No. R-2012-0014, which adopted a budget for fiscal year 2012-13 and adjusted Orem's property tax to raise an additional $1,700,000 per year for municipal operations. The Orem property tax on a $187,000 residence would change from $192 to $242, which is $50 per year. The Orem property tax on a $187,000 business would change from $350 to $440, which is $90 per year. The property tax adjustment will take effect only if approved by voters. Are you for or against the property tax adjustment taking effect?

Petitioner's challenged this language for three reasons: (1) the language failed to give a true and impartial statement of the purpose of the measure by failing to mention UTOPIA, (2) the title created an argument for the measure by minimizing the perceived burden on businesses, and (3) the wording is otherwise "unsatisfactory" in that it seeks to hide from the voters the causal connection between the UTOPIA bond obligation and the requested tax rate increase.

The Utah Supreme Court held the title was true and impartial and while changes may make it better, the Court's deferential standard of review does allows for second guessing the language. The Court also held the title does not create an argument in favor of the measure by use of the truth-in-taxation language. The truth-in-taxation language explained to residence what the cost would be to the average home owner and business owner for an average costing home. Lastly, the Court held, "the unsatisfactory language of the statute does not present a separate basis for review of the ballot title." *Burr v. Orem City*, 2013 UT 57

Withdraw of Guilty Plea Denied

Defendant and his aunt got into a fight and defendant hit her. He then bound her and killed her. He told police he killed her because she had testified against him about a previous aggravated assault and to prevent her from testifying about the assault committed just before her murder. Defendant pled guilty to aggravated murder and aggravated assault resulting from two unrelated incident. The day after pleading guilty, the defendant sent two handwritten notes to the judge saying that he was

Continued on page 4

Continued from page 3

confused when he entered his guilty plea and requested permission to withdraw his plea. An attorney was appointed and defendant moved to withdraw his plea. Oral arguments were held and the motion was denied.

The Utah Supreme Court held that a guilty plea may be withdrawn if it was not knowingly and voluntarily made. The Court held defendant's plea was knowingly and voluntarily made because he did understand the relation of the facts to the law and he was not misinformed or confused about his right to appeal. The conviction was affirmed. *State v. Candland*, 2013 UT 55

Termination For Excessive Force Upheld

Officer Nelson picked up a suspect to book him into jail. While booking him into jail, Nelson became agitated when the suspect threw his bracelet on the floor. The officer told the suspect to pick the bracelet up and put it on the counter. The suspect refused and the officer became physical with the suspect. The officer took the suspect to the ground, put his weight on him with his knee, and pushed his arms behind his back. The officer testified during review of the incident he used force to punish and hurt the suspect, instead of just restraining him. Officer Nelson was terminated by the Orem City Police Department (OCPD) after he used excessive force while booking a suspect into the Orem City Jail.

The Utah Court of Appeals reviewed the decision to terminate Officer Nelson and upheld the decision and held the officer's termination was not inconsistent with prior sanctions under OCPD's policy. The court also held OCPD's experience in employee discipline and the public's expectations of police conduct justified any disparate treatment from other employee's and that the officer failed to identify any prejudice.

The Utah Supreme Court affirmed the court of appeals decision holding, "the court of appeals review of the Board's decision is limited by statute to a review for an abuse of discretion, and the particular question at issue in this case—the consistent application of OCPD's excessive force policy—does not require heightened review as a matter of due process…the court of appeals was correct that any procedural due process violations were harmless." *Nelson v. Orem City*, 2013 UT 53

Exclusion of Evidence Under 412(b) Prejudicial Error

Defendant and his girlfriend argued about the girlfriend's relationship with a man in California. When speaking to investigators, the couple agreed that they fought about this, but they disagreed about what happened after the argument. Defendant claims they had "make-up sex," including oral and anal sex. The victim claimed defendant forced her to give him oral sex and then raped her anally.

At trial, defendant moved to admit previous sexual history arguing it was important for jury members to know that the couple had engaged in consensual anal sex before. The past sexual history was excluded with the court deciding this evidence was not sufficiently relevant under URE 412. Defendant also moved to admit a previous conviction of the victim for lying to police officers about a sexual assault. The court allowed this evidence was allowed only if the State opened the door.

On appeal, defendant argued the evidence of the couple's past sexual relationship was allowed under the URE and the exclusion was error. Defendant also claimed the error prejudiced his defense. The Utah Supreme Court held, "the sexual history evidence proffered by defendant fells squarely within the URE 412(b) exception." The supreme court held, "the trial court's exclusion of [defendant's] proffered sexual history evidence was error that undermined the jury's verdict." The court reversed and remanded the case for a new trial. *State v. Richardson*, 2013 UT 50

Verdict Overturned And *Hopt* Rule Adopted

Turner was severely injured in an automobile accident and received treatment for her injuries at the U of U Hospital (Hospital). She claimed she was made a paraplegic because of the Hospital's negligence. At trial, Turner showed evidence that the spinal injury she came in with was made worse while at the hospital, that the Hospital failed to ensure that she was treated according to spinal precaution guidelines, and the Hospital failed to post a warning about her injury on her bed.

The Hospital argued the evidence that her injury was made worse was inconclusive because the first scan of her injury was a CT scan which cannot show damage to soft tissues, and the second was a MRI which can show damage to soft tissues. Furthermore, the Hospital showed that the spinal

Continued on page 6

PROSECUTOR PROFILE

Pat Finlinson
Deputy Millard County Attorney

Quick Facts

Law School: Utah

Favorite Food: Sinigang Hipon (Tamarind Soup with Shrimp)

Last Book Read: Confederacy of Dunces by John Kennedy Toole

Favorite Dessert: Rhubarb Pie

Favorite TV series: Breaking Bad - I was one of the ten people who watched the first season and I am one of the ten gazillion people watching the final season. It's much funner to watch it now that others are interested.

Favorite Movie: It's A Wonderful Life

Pat was born in Delta, Utah and grew up there and Oak City. As a child he wanted to be a veterinarian. His father was a a school bus mechanic and school transportation administrator and his mother was a school bus driver. He says about them, "All of my worthwhile achievements are directly attributable to their influence."

Pat attended Utah State University, graduating with a BA in Family and Human Development in 1997. He decided to go to law school after a professor convinced him to take the LSAT—just to see. He graduated law school from the U of U in 2000.

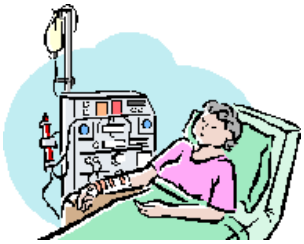
He tells about how he became a prosecutor,

"In June 2006 I was happily managing risks at Intermountain Power. The county attorney at the time called me one morning and asked if I had any interest in prosecuting justice court cases. I instinctively told him no but over the next few days I underwent a strange, perhaps delusional, change of heart. My wife and management at the power plant were supportive so I called the county attorney back and accepted the position. By the end of the year the other prosecutor left the office and the county commission decided that they would not be funding a replacement for him. I found myself prosecuting the entire spectrum of criminal cases with almost no court room experience. Mark Nash hooked me up with all the training he could find and I relied heavily on prosecutors in neighboring counties for help and advice. I am particularly indebted to Jared Eldridge in Juab County and Scott Garrett and Troy Little in Iron County, whom I abused on an almost daily basis."

About being a prosecutor Pat said, "We get to delve deeply into people's lives and see the complexities of human behavior and interaction. It is humbling and, at times, overwhelming to see the burdens people carry through life." He said the most rewarding thing about the job has been the associations and friendships formed with other prosecutors police officers, defense attorneys, victims and even defendants.

Continued from page 4

precaution guidelines were communicated to each nurse at shift change and that posting a warning on the bed was not a standard practice. The jury returned a verdict of no negligence and Turner appealed. On appeal, Turner argued she was entitled to a new trial because the trial court issued Instruction No. 30, which was unwarranted and prejudicial. Jury Instruction No. 30 told the jury that when there is an approved alternative method of treatment that is being used in the medical community, there is no medical malpractice if the method chosen later turns out to be wrong or not favored by the provider. The Supreme Court agreed holding, "Jury Instruction No. 30 was error because it was unsupported by the evidence and undermines our confidence in the verdict." Here, the court held that the posting of the sign on the bed was not an alternative method of treatment. The court held that giving this instruction when there were not two approved methods of treatment was confusing for the jury and undermines the confidence in the jury's decision. The case was remanded and a new trial ordered. The Utah Supreme Court also instructed the courts "the cure-or-waive rule is no longer the standard governing preservation of jury bias. Instead, appellate courts will apply the *Hopt* rule in order to determine whether the issue of jury bias has been adequately preserved." The *Hopt* rule was stated as: "[u]ntil [the defendant] had exhausted his peremptory challenges, he could not complain about possible jury bias."



Turner v. U of U Hospitals, 2013 UT 52

Utah Court of Appeals

Mental State Of Principle Offense Allows For Accomplice Manslaughter

Defendant was a gang leader for many years. His second in command, partner, and best friend was Chris Alvey. The victim spent time with the gang, committed crimes, and used drugs with them. Eventually, the victim was considered a snitch. Defendant put out a hit on the victim by telling gang members there was a green light on her.

Chris Alvey found the victim with a list of the gang member's phone numbers and phone calls they had made that day. Defendant told Alvey to take her up the canyon in a van and leave her there. He told Alvey, "Don't bring her back." Alvey was going to just drive up there and leave her on the side of the road, but based on his instructions from defendant he shot her four times and left.

Defendant was charged with aggravated murder as an accomplice and in the alternative one count of depraved indifference murder. The trial court gave an jury instruction on manslaughter in response to defendant's request and over the State's objection. Defendant was convicted of the manslaughter charge.

On appeal, defendant argued he could not be convicted of manslaughter as an accomplice. However, the court held that the defendant may be convicted as long as he has the mental state of the principle offense. The court held, here the principle offense was manslaughter and the evidence showed defendant had the mental state to be convicted. *State v. Binkerd*, 2013 UT App 216

Cumulative Prejudice Overturns Verdict

A neighborhood watch turned ugly when David Serbeck and Reginald Campos met. Serbeck and neighbors were looking for cars or suspects involved in recent crimes. Serbeck and the neighborhood watch president spoke to Campo's daughter and some friends as they were walking around the neighborhood. Later, out of weird coincidence, Serbeck ended up following the same girl's car, believing it was involved in the crimes, as she drove through the neighborhood on her way back home. The girls became hysterical thinking the same person who spoke to them earlier was now following them and called Campos for help.

The girls arrived home and Campos and his daughter went out looking for the car following them. They spotted Serbeck in his car and pulled in front of it forcing him to stop. Serbeck and Campos both got out of their cars holding pistols.

Campos shot Serbeck three times, paralyzing him from the chest down. Campos was charged with attempted murder with injury and aggravated assault. At trial, Campos argued he acted in self-defense because he heard Serbeck rack his pistol. He argued that

Continued on page 7

Continued from page 6

the safety on Serbeck's weapon, which was engaged when police recovered the weapon, was engaged when the gun was kicked, after Serbeck was shot. The jury rejected the argument of self-defense and convicted Campos of both crimes.

Campos appealed claiming ineffective assistance by his trial counsel because his counsel failed to request a jury instruction on extreme emotional distress, failed to object to the verdict form, and failed to object to several instances of alleged prosecutorial misconduct. The appellate court held, "we cannot say that Campos's trial counsel acted unreasonably in this case by pursuing one middleground defense and choosing to forego another that was arguably inconsistent with Campos's version of events" concerning the failure to request a jury instruction.

The appellate court also held, "Campos's trial counsel's failure to object to the verdict form fell below an objective standard of reasonableness." The appellate court held "the verdict form was fundamentally flawed" because "it require[d] an affirmative defense to be established beyond a reasonable doubt" and so, "Once it had been established that an imperfect self-defense instruction was warranted, "[i]t was . . . [Campos's] trial counsel's responsibility to ensure that it be made plain to the jury that [Campos] did not bear any further burden of proof on the matter and that, rather, the State alone had the responsibility to disprove his defense beyond a reasonable doubt."

The appellate court also held the prosecutor's comments during closing were objectionable. The court held that the statements about Campos "stealing from [Serbeck] his ability to run, his ability to bike, his ability to walk his daughter down the aisle" appealed to the passions of the jury and prejudiced the defendant.

The court of appeals held that the cumulative prejudice of deficient performance undermined the court's confidence in the verdict and so the conviction was reversed. *State v. Campos*, 2013 UT App 213

Facts Supported Attempted Kidnapping

Fower was driving around Salt Lake City looking for a prostitute when he saw T.H., the fourteen-year-old victim. Fower pulled up next to T.H. while she was walking on the sidewalk and asked if she needed a ride. She said no and kept walking. Fower than pulled the car forward into a driveway blocking T.H.'s path and again asked if she wanted a ride. She said no and so Fowers got out of the car and grabbed her forearm, telling her, "I can give you a ride, just get in." T.H. then told him no and kicked him in the knee to get away. T.H. reported the incident to the police and Fower was arrested in the area shortly afterwards. Fower was convicted of attempted kidnapping.

On appeal, Fowers argued the district court erred by denying his motion to dismiss based on insufficient evidence. The State argued the fact that Fowers knowingly "detained or restrained a minor between the ages of fourteen and eighteen without the consent of the minor's parent" was sufficient for a conviction of kidnapping. The appellate court held they only needed to find that there was sufficient evidence presented to show that Fowers engaged in conduct that was a substantial step towards detaining or restraining T.H. and strongly corroborating his intent to detain her.

The court held that the evidence of T.H.'s testimony and Fowers corroborating version of events told to the police after the event showed it was inherently improbable that reasonable minds must have entertained a reasonable doubt." The court held, "despite minor inconsistencies in T.H.'s testimony, the evidence presented by the State was sufficient to support the district court's denial of Fowers's motion to dismiss." *State v. Fowers, 2013 UT App 212*

Disclaimer Did Not Change Merit Status

Howick was general counsel for the Salt Lake City International Airport when they offered her and other attorney's the option to become an "Appointed Senior City Attorney." This position was created because of salary dissatisfaction of some city attorneys. The position was the same work load and came with a significant pay increase, but required the employees to sign an At-Will Employment Disclaimer. Several attorneys declined the offer, remained at their pay grades, and stayed merit employees.

Eventually, Howick was terminated even though she had "tremendous

Continued on page 9

On the Lighter Side

Cat Violated Leash Law While Riding In Wheelchair

Pooh bear was unfortunately born without working back legs. So his owner replaced his back legs with a wheel-chair she bought off ebay. However, while taking the cat for walk in the park because the cat needs to stretch its backlegs, the owner was ticketed for having the cat off the leash.

Animal services stated there are no exceptions to the leash law, even for disabled animals. The captian of animal serives said "She had been warned it was not legal. Basically, we have someone that just is not getting the fact that you have to be in control of your animal when it's off your property. Your animal could be injured. It could be hurt. It could run out in the street. It could be attacked by another animal. It's just the law that we have to follow" If you follow the link, you can see a video of pooh bear.

http://www.wesh.com/news/central-florida/brevard-county/owner-ticketed-for-walking-wheelchairbound-cat-without-leash/-/11788124/22358780/-/item/0/-/80of99z/-/index.html

Halloween Candy Final Four

KSL newsradio created a tournament bracket for the most popular Halloween candy. The final four are: Snickers, Twix, Reese's, and Skittles. You can vote at this link: http://www.ksl.com/?sid=27423752&nid=1010&title=candy-final-four-whats-the-greatest-halloween-treat&fm=home_page&s_cid=featured-5

And some costume ideas:

http://www.huffingtonpost.com/2013/10/14/clever-halloween-costumes_n_4097087.html

Happy Halloween!!

Continued from page 7

expertise and experience that was not replicated by anyone else in the City Attorney's Office." She appealed the termination claiming she was a merit employee. In district court, Howick obtained a partial summary judgment that she had retained merit employee status even after signing the Disclaimer.

The City appealed, claiming the district court erred by failing to fully analyze the issues before it, ruling that Howick's claims were not time-barred, concluding that Howick was a merit employee, and rejecting the City's defenses of waiver and estoppel based on the Disclaimer. Howick cross-appealed claiming the district court should have granted her summary judgment motion in its entirety and reinstated her as an employee of the City.

The appellate court held the "district court did address the limitations defense "on the merits" and thus [we] do not agree with the City that the district court, in the City's words, "failed to undertake the legal analysis required by this court." *Howick v. Salt Lake City Corporation*, 2013 UT App 218

Amended Charge Allowed To Stand

Defendant was originally charged with sodomy on a child. However, at trial the testimony was that defendant pulled down the victim's pants and touched his testicles. There was no evidence of sodomy presented. Defendant moved to dismiss the charge for lack of evidence. The State requested the court allow them to amend the charge to the lesser offense of sexual abuse of a child. The court allowed the State to amend the charge and defendant was adjudicated delinquent for one count of sexual abuse of a child.

On appeal, defendant argued the court erred by not dismissing the charge for lack of evidence. The court of appeals held defendant did not argue that allowing the State to amend the charge was error and therefore there was no error in denying the motion to dismiss for lack of evidence because the evidence was presented proved the amended charge. *D.M. v. State*, 2013 UT App 220

Reasonable Certainty Of Exculpatory Material Required For Records Disclosure

Defendant was accused of sexually abusing Victim repeatedly between 1989 and 1994. Victim testified at trial describing the abuse and the dates on which it occurred. Defendant testified and refuted the allegations by showing that on some of the dates he was accused of abusing Victim he did not have access to her. Victim took the stand again and stood by her account of the abuse, but said she might have got the dates wrong. Defendant was convicted of one count of aggravated sexual abuse of a child and three counts of sodomy upon a child.

Defendant filed a petition for relief, claiming ineffective assistance of counsel because his attorney failed to get records from doctors and therapists of the Victim. Defendant also moved to have the records reviewed in camera. The district court granted the motion disclosing the records and the State filed an interlocutory review of the district court's order.

The State argued the district court erred in determining the possibility of inconsistent statements and that defendant did not show adequate extrinsic evidence to demonstrate the required reasonable certainty that the Victim's records contained exculpatory evidence. The appellate court held, "The mere possibility of inconsistencies in Victim's statements to her various doctors and therapists in no way establishes—without impermissible speculation—the physical, mental, or emotional condition required by rule 506(d)(1)(A) of the Utah Rules of Evidence. Further, defendant failed to provide extrinsic evidence demonstrating a reasonable certainty that Victim's records contain exculpatory material." *McCloud v. State*, 2013 UT App 219

Sentence Upheld As Properly Considering All Factors

Defendant was sentenced on convictions in two separate cases. The trial court ordered the sentences for the two cases to run consecutively. Defendant appealed arguing the trial court abused its discretion in imposing consecutive sentences because they did not explicitly consider defendant's rehabilitative needs at sentencing.

The court of appeals held, "As a general rule,

Continued on page 10

Continued from page 9

we presume that the district court made all the necessary considerations when making a sentencing decision" and "A sentencing judge is not required to articulate what information [he] considers in imposing a sentence. Accordingly, this court will not assume that the trial court's silence, by itself, presupposes that the court did not consider the proper factors as required by law." In this case the court held the trial court had the benefit of a presentence report which provided all of the statutory considerations for the court and that the sentence was reasonable given the presentence report. *State v. Melendrez*, 2013 UT App 200

Tenth Circuit Court of Appeals

Lack Of Mitigating Circumstances Not Unreasonable

Defendant was in prison for burglary when he got a job in the kitchen. While working there he became friends with Ms. Carter. Defendant was soon fired from the kitchen for fighting with another inmate. This firing caused him to have a grudge against Ms. Carter and soon he was threatening her. One day after breakfast, he waited in the dining hall and when Ms. Carter passed by him he put his hand over her mouth and dragged her into a small closet. In the closet, he stabbed Ms. Carter sixteen times with a shank.

Defendant was convicted of the murder and the State sought the death penalty. During the penalty phase no mitigating evidence was introduced. Defendant argued this created a prejudicial effect on his appeal for relief. The Oklahoma Court of Criminal Appeals (OCCA) denied relief on appeal and defendant filed for federal habeas corpus relief.

In his habeas corpus appeal, Defendant claimed that the OCCA should have heard that he was a sensitive child, grew up the youngest of nine children and was extremely poor. Defendant claims these factors led him to a life of crime because he was stealing at a very young age and was put in juvenile detention
centers where he made friends with the "wrong crowd." Defendant had spent twenty years in prison when he committed the murder of Ms. Carter.

The U.S. Court of Appeals for the Tenth Circuit held the precedents did not show that the lack of mitigating circumstances was unreasonable. The Circuit Court also held the OCCA was not unreasonable in any respect when it concluded that he was unable to show prejudice by the lack of the mitigating circumstances. The conviction was upheld. *Grant v. Trammell*, 10th Cir., No. 11-5001, 8/15/13

Government Must Prove Promissory Note Is A Security

Defendant was charged with eight counts of securities fraud after being part of a scheme that fraudulently sold securities. The scheme involved offering financing for preparing revocable trusts for clients who could not pay the full cost. Clients who financed the service signed a promissory note in favor of the business agreeing to pay the balance over a thirty-six month period. The loans were then sold to Global West. The company's salesmen told potential investors that the notes were secured by real estate and secured by liens. This made the notes seem more secure than they really were. Defendant was convicted of seven counts of securities fraud and other charges.

On appeal, defendant argued a jury instruction naming the notes as securities was an error because the Supreme Court held not all notes are securities and therefore the Government needed to prove the notes were securities at trial. The U.S. Court of Appeals held the jury instruction which stated a "security" includes "a note" conflicted with the U.S. Supreme Court's holding in *Reves v. Ernst & Young*, 494 U.S. 56 (1990). *Reves* held that not all notes are securities. The Tenth Circuit Court also held that the government must prove that the note was a security as an element of a Section, 78j(b). *United States v. McKye*, 10th Cir., No. 12-6108, 8/20/13

Court's Misstatement about Right To Appeal Invalidates Plea

Defendant was indicted for possession of a controlled substance with the intent to distribute. After his motion to suppress was denied, defendant sought to enter into a conditional plea agreement with the government. He requested the right to preserve the right to appeal, but the government did not agree. However, defendant eventually entered an unconditional guilty plea agreement.

At the change of plea hearing, the judge told defendant he had the right to

Continued on page 11

Continued from page 10

an appeal, but was giving up other rights. The court then accepted and entered defendant's unconditional guilty plea.

The U.S. Court of Appeals for the Tenth Circuit held, "[A] district court materially misinforms a defendant of the consequences of an unconditional guilty plea when it advises the defendant that he as the right to an appeal…without ensuring that the defendant understand that the plea may limit that right." The court held that because defendant was informed he would had the absolute right to appeal, when he in fact did not, defendant's plea was not knowing and voluntary. *United States v. Avila*, 10th Cir., No. 12-3047, 8/21/13

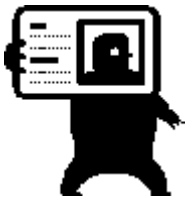
Other Circuits/ States

No Authority For Local Law Enforcement To Arrest For Immigration Violations

Defendant was eating lunch and taking a break from work outside the grocery store where she was employed. Two county Deputy Sheriffs arrived in a patrol car. They both got out of the car and approached defendant. They asked her if she spoke English, which she replied she didn't. They then asked her if she had an I.D. and she replied she didn't. When the officers stepped away for a minute and defendant remembered she had her El Salvadoran national identification card with her. She took the card to the deputies and they ran a warrant check.

After twenty minutes of talking to the deputies, defendant headed back into the store to start her shift. When she attempted to stand to leave, the deputies grabbed her and handcuffed her. The officers had found out that she had an active civil warrant for immediate deportation. Defendant was arrested and taken to a detention center where she was held until her supervised release.

Defendant filed a §1983 complaint against the deputies alleging they violated her Fourth Amendment rights when they unlawfully seized and later arrested her. Defendant argued that local law enforcement lacked authority to enforce civil federal immigration law.



The Court of Appeals for the Fourth Circuit held that while the federal government does have the right to allow certain local law enforcement personnel to perform the functions of federal immigration officers, there must be a written agreement. Because civil immigration violations are not criminal in nature, local law enforcement does not have the right to detain or arrest someone for their immigration violations. *Santos v. Frederick Cnty. Bd. of Commissioners*, 4th Cir., No. 12-1980, 8/7/13

Continued on page 12

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Continued from page 11

SORNA Does Not Require Reporting Moving Out Of The Country

Defendant was convicted for sexual abuse in 1990 and 1993 and was required to register as a sex offender under Sex Offender Registration and Notification Act (SORNA). In February 2011, defendant was registered as living in Clay County, Missouri. On May 3 of the same year, defendant boarded a plane and flew to the Philippines and did not return. On July 20, he was arrested in the Philippines and was deported back to the U.S.

Defendant was charged with one count of failing to update his registration. Defendant argued SORNA did not require him to update his registration when he left the U.S. The Government contended that defendant had a reporting obligation to Missouri when he changed his residence to the Philippines.

The Court of Appeals for the Eighth Circuit held that because the text of SORNA does not extend registration requirements to moving out of the country, the motion to dismiss was meritorious. The court of appeals reversed the district court's decision to grant summary judgement. *United States v. Lunsford*, 8th Cir., No. 12-3616, 8/5/13

Statement Made Post-Miranda Invocation Admissible For Impeachment

Defendant tried to cross the U.S.-Mexico border as the driver of a Toyota Camry. Border agents found several kilograms of methamphetamine hidden in the gas tank. After agents informed defendant of his *Miranda* rights an agent asked defendant if he wanted to talk. Defendant responded, "no, because they will kill his family."

Before trial, defendant moved to suppress the statement that he couldn't talk because they would kill his family. The district court held the government could not introduce the statement during its case-in-chief because defendant invoked his *Miranda* rights when he stated he couldn't talk. However, the government was allowed to introduce the statement to be used as impeachment. At trial, the government introduced the statement to impeach defendant's testimony that he was unaware there were drugs in the car. The defendant was convicted and sentenced to 135 months imprisonment.

On appeal, defendant argued that the prosecution's introduction of a post-arrest statement violated *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court of Appeals for the Ninth Circuit held that voluntary statements are admissible as impeachment evidence, even if obtained in violation of *Miranda*. Here, the court held defendant's statement about why he couldn't talk was voluntary and was used to impeach defendant's testimony about not knowing about the drugs. *United States v. Gomez*, 9th Cir., No. 12-50018, 8/6/13

Implied Truthfulness Of Transcript Violated Confrontation Clause

Defendant was hired by Diaz to participate in Diaz's indoor marijuana growing operation. Diaz bought a home in defendant's name. Defendant set the house up to grow marijuana and hired a caretaker. Defendant was paid thirty percent of the profits. Defendant participated in six harvests which yielded over 2,400 marijuana plants. The DEA investigated and defendant was indicted by a grand jury.

At trial, the Government played recording of the wiretaps the DEA had placed on Diaz's telephone. Most of the conversations were in Spanish, but the government provided the jury with an English version of the transcript. The translator who created the transcripts was not present at trial and was not available for cross examination. Instead, the Government established the accuracy of the transcripts through the testimony of Diaz, who spoke both English and Spanish. Defendant objected claiming the lack of the translator violated the confrontation clause. Defendant's objection was overruled and he was convicted.

On appeal, defendant again claims that his Confrontation Clause rights were violated. The U.S. Court of Appeals for the Eleventh Circuit held the confrontation clause only applies to testimonial statements. The Circuit Court held that the translations did not contain any testimonial hearsay statements by the translator, but the translation did contain implicit representations that the transcripts

Continued on page 13

Continued from page 11

were correct. The Circuit Court held this implicit representation qualifies as a hearsay statement for the purposes of the Confrontation Clause. The court also held that the transcripts would have been testimonial, but the court held that because Diaz testified that the transcripts were accurate there was no testimony by the translator that the transcripts were accurate. *United States v. Curbelo*, 11th Cir., No. 10-14665, 8/9/13

Certificate Of Applealablity Required

The theory of the murder was that petitioner hired Heckstall to kill Drabik after Drabik told the police that Drabik was selling drugs. Petioner called Heckstall many time and discussed lureing Drabik to meet them about a possible construction job. Drabik was killed at seven in the morning. Eyewitness say defendant's car in the area of the murder and also saw Heckstall. The defendant's case was dismissed based on a trial error and the State indicted him again for the murder.

Petitioner appealed a judgment denying him a writ of habeas corpus. Petitioner sought the writ pursuant to 28 U.S.C. § 2241 to prevent New York State from retrying him on murder charges arising out of the killing.

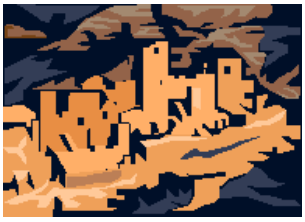
The U.S. Court of Appeals for the Second Circuit held, "that [the Court's] jurisdiction to hear an appeal brought by a state prisoner from the denial of a § 2241 petition requires the issuance of a certificate of appealability." "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255." *Hoffler v. Bezio*, 2d Cir., No. 11-5281-pr, 8/8/13

State Had Authority To Issue Warrant For Property On Reservation

Defendant, an enrolled member of the Colville Tribes, was arrested at his home. Defendant's home was on tribal trust land located within the City of Omak and the Colville Indian Reservation. The Omak detective who arrested defendant suspected he was involved in a break-in at a railroad facility which was in the town of Omak and on the reservation.

The detective applied for a search warrant for defendant's residence to look for evidence related to the break-in. The detective sought the warrant from the Okanogan County District Court (OCDC), even though he was requesting to search tribal trust land. The OCDC issued the warrant and police seize evidence related to the break-in. The State charged defendant with burglary in the second degree, theft in the first degree, and malicious mischief in the third degree. The defendant moved to supress the evidence seized claiming the Colville Tribal Court had jurisdiction over his property, not the OCDC, and so the warrant was invalid.

The agreement that limits the States authority gives them authority over crimes committed on fee land within the reservation's borders. Here, the theft occurred on fee land within the reservation's borders.



The Washington Supreme Court held, "The State did not infringe the Colville Tribes' sovereignty by issuing and executing a state warrant on defendant's residence on tribal trust land within the borders of the Colville Indian Reservation because Colville Tribes had not exercised their sovereignty to regulate the State's ability to execute its process at the time of the search." The conviction was affirmed. *State v. Clark*, Wash., No. 87376-3, 7/25/13

California Law Allows Reversal For Immigration Implications

Defendant was arrested for selling a brown bindle of marijuana for eight dollars. The officer that witnessed the transaction tracked defendant down one hour after the transaction. Defendant was charged with a single count of sale of marijuana.

Defendant pled guilty to the charged offense and received a sentence of formal probation for three years and other terms. On the order for the plea proceedings there were boxes to be checked for the advisements given to defendant during plea proceedings. There was one for advisements about immigration consequences and it was not checked.

Defendant later sought adjustment of

Continued on page 14

Continued from page 11

his status for lawful permanent residency and his application was denied because of his conviction. He then faced deportation and permanent exclusion from the country. Defendant filed a motion to vacate his conviction claiming he would have negotiated for a different charge that did not have the same immigration consequences or gone to trial. California law 1016.5 codified the idea that defendants have the right to be informed of any immigration consequences of plea agreements. The court of appeals denied the motion to vacate.

The California Supreme Court held, "because the test for prejudice considers what the defendant would have done, not what the effect of that decision would have been, a court ruling on a section 1016.5 motion may not deny relief simply by finding it not reasonably probable the defendant by rejecting the plea would have obtained a more favorable outcome." The supreme court cautioned that there will not be a massive overturning of cases because "relief is available only if the trial court failed to provide the statutory advisement or if the record is silent on that subject" and "relief is available only to persons who are not otherwise deportable, that is, who have not since their conviction engaged in other conduct that would trigger immigration consequences." The judgment of the Court of Appeals was reversed and the case remanded. *People v. Martinez*, Cal., No. S199495, 8/8/13

Motion To Suppress Upheld For Lack Of Reliable Informant

A New Hampshire State trooper received information defendant was growing marijuana in his home. The trooper submitted an affidavit for a warrant to search the home. Defendant's home was searched and the incriminating evidence was seized. Defendant filed a motion to suppress the evidence claiming the search warrant lacked probable cause because it was facially insufficient.

The U.S. Court of Appeals for the First Circuit upheld the suppression of evidence. The court held, "The information [provided by the informant] is not so specific and specialized that it could only be known to a person with inside information. Further, information about Gifford's former and current occupation are not so self-verifying to establish the reliability of the informant." The court held, the informant was not shown to be reliable because there was no self-verifying information and the informant did not have a reliable track record for informing the police. *United States v. Gifford*, 1st Cir., No. 12-2186, 8/13/13

Defendant's Assertion Of Lack of Information Sufficient To Overthrow Waiver Of Appeal

Defendant was home when a case worker from the Indiana Department of Child Service and two detectives from the Drug Task Force asked to conduct a welfare check on his fiancée's, Tina Funk, children. Defendant refused to allow the detective into his home. However, after they informed Funk her children would be taken from her if she did not agree to the search, she agreed to have them search the home.

The detectives found drug paraphernalia, a handgun, marijuana, and small amounts of methamphetamine. Defendant wanted his counsel to advocate his defense that the search violated his rights. However, his attorney did not argue his rights were violated and defendant ended up taking a plea agreement. The agreement contained a provision noting his agreement not to contest his conviction or sentence in a collateral attack under 28 U.S.C. § 2255. The district court later rejected defendant's request for an evidentiary hearing and his § 2255 motion.

On appeal, the government argued habeas review of his claims is not applicable to defendant because he did not allege his counsel was ineffective in the negotiation of the waiver provision of his plea agreement, as opposed to the agreement as a whole. The court held "[defendant] need not have alleged that his counsel was ineffective in the negotiation of the waiver provision of his plea agreement specifically." Defendant asserted, "he would not have agreed to the terms of the plea agreement had his counsel informed him of his potentially meritorious Fourth Amendment claim." The court held defendant's assertion was "sufficient to overcome the collateral review waiver in his plea agreement." The court reversed the district court's denial of defendant's petition and remanded the case. *Hurlow v. United States*, 7th Cir., No. 12-1374, 8/9/13

Continued on page 15

Continued from page 14

Criminal Investigation Is Not A Official Proceeding

The FBI became concerned that Hell's Angels motorcycle club was trying to move into Modesto, CA and become a presence in the area. They were aware of some contacts the gang had at the Road Dog Cycle Shop in Merced. The FBI then started following the contacts and became suspicious that some individual associated with law enforcement were leaking information to the owners of the shop, the Holloways.

In order to find the leak, the FBI put out a bulletin informing law enforcement that they would be doing surveillance at the annual summer part the shop held. They monitored the wiretaps of the Holloways phones after releasing the bulletin and found that the defendant called the Holloway's close personal friend and private investigator. The investigator in turn called the Holloways and told them to clean up the shop and watch their back.

At the conclusion of the investigation, defendant was interviewed and arrested on obstruction of justice. Defendant argued he "could not be convicted under the obstruction of justice statute, section 1512, because their alleged obstruction of an FBI investigation did not qualify as obstruction of an "official proceeding" under the statute." The district court rejected this argument and the jury convicted defendant.

The U.S. Court of Appeals for the Ninth Circuit held, "official proceeding" "does not include a criminal investigation" and the court reversed the conviction and remanded the case. *United States v. Ermoian*, 9th Cir., No. 11-10124, 8/14/13

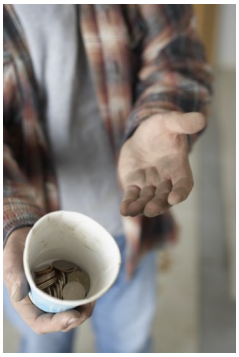
Prosecutors Must Prove Federal Prison Is On Federal Land

Defendant assaulted a fellow inmate by hitting him in the face multiple times. A grand jury in the Eastern District of New York returned an indictment charging defendant with violating Title 18 U.S.C. Section 113(a)(6). The Section requires, "whoever, within the special maritime and territorial jurisdiction of the United States, commits an assault resulting in serious bodily injury" shall be punished by fine or up to ten years' imprisonment. Special maritime and territorial jurisdiction of the United States is defined as "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

At trial, the only evidence that was presented about the prison being a special maritime and territorial jurisdiction of the United States was testimony that the prison was on federal land. The U.S. Court of Appeals for the Second Circuit held the evidence presented at trial was insufficient. However, the Circuit Court affirmed the judgment because the prison was a legislatively and factually on federal land. The court held that prosecutors must prove each element, even that a federal prison meets the definition of special maritime and territorial jurisdiction of the United States. *United States v. Davis*, 2d Cir., No. 11-2325-cr, 8/14/13

Anti-Begging Law Unconstitutional

Michigan's anti-begging statute provided that "[a] person is a disorderly person if the person is any of the following: . . . (h) A person found begging in a public place." Mich. Comp. Laws Ann. § 750.167(1)(h) (West 2013). Police were enforcing this statute from 2008 to 2011. The law was challenged alleging the law violated the First Amendment, both facially and as applied, and the Fourteenth Amendment's Equal Protection Clause. The district court found the law unconstitutional.



The U.S. Court of Appeals for the Sixth Circuit held, "begging, or the soliciting of alms, is a form of solicitation that the First Amendment protects." The Court held, "sustaining the facial challenge in this case is appropriate because the risk exists that, if left on the books, the statute would chill a substantial amount of activity protected by the First Amendment." Thus, the Court held, "the anti-begging

Continued on page 16

Continued from page 15

ordinance violates the First Amendment in banning a substantial amount of activity that the First Amendment protects" and affirmed the district court's judgment. *Speet v. Schuette*, 6th Cir., No. 12-2213, 8/14/13

Government Failed to Show American Express Was a Bank

Defendant participated in a scheme to fraudulently obtain funds by fake credit card purchases. The conspirators agreed to run the business credit card through defendant's luxury car dealership. They would charge fictitious purchases of tractor-trailer trucks in their fake petroleum company. They stole over $600,000 dollars from American Express this way.

At trial, the government had an FBI agent testify that American Express was a FDIC insured bank because part of the company is a depository institution holding company. The Agent explained the American Express is an FDIC insured bank that serves American Express. However, the Agent did not explain fully the corporate structure that allows American Express to be a credit card company and a FDIC insured bank. One of the jury instructions defined American Express as being insured by the Federal Deposit Insurance Corporation. Defendant's were charged and convicted of bank fraud. Defendant argued that he couldn't be convicted of bank fraud because the government did not offer sufficient evidence that American Express was a FDIC insured bank. The U.S. Court of Appeals agreed and held, "the government did not offer evidence sufficient for any reasonable jury to find beyond a reasonable doubt that American Express Company was a depository institution holding company." The conviction was reversed and remanded. *United States v. Davis*, 5th Cir., No. 12-20443, 8/19/13

Possession Is a Lesser Included Offense of Distribution

Defendant was approached by an undercover DEA agent about buying cocaine. Defendant then sold the agent two small baggies of cocaine. The Agent then saw then man get into his car. Agents stopped him, identified him, seized the cocaine and released defendant to preserve the integrity of the undercover operation.

The district court rejected defendant's request for a jury instruction that simple possession of a controlled substance is a lesser-included offense of distribution. The U.S. Court of Appeals for the Fifth Circuit held the district court erred when it denied the lesser-included offense instruction. The court held that a defendant does not have to possess contraband in order to distribute it. The court held distribution had been defined as broad enough that defendant can distribute without actual or constructive possession. *United States v. Ambriz*, 5th Cir., No. 12-50839, 8/16/13

Securities Fraud Does Not Apply Extraterritorially

Defendants ran an investment company that managed investment funds. They were also sole shareholders of a corporation organized in Panama to handle off-shore investment funds offered to U.S. investors. They misrepresented the rates of return to many of their closely known investors. They then induced a large investor to invest in a fake Small Business Investment Company (SBIC), placing the money she invested into the Panama corporate account. Defendants then used the account personally to settle lawsuits, pay their mortgage, and other expenses.

They were indicted and convicted of securities fraud along with many other federal criminal violations. On appeal, defendant argued the conviction for securities fraud must be reversed because their actions were extraterritorial and the statute did not cover extraterritorial actions. The Court of Appeals for the Second Circuit held that they perpetrated the fraud in connection with domestic securities transactions and were therefore guilty. The Circuit Court also held the statute, 17 C.F.R. § 240.10b-5, does not apply to extraterritorial conduct, regardless of whether liability is sought criminally or civilly. *United States v. Vilar*, 2d Cir., No. 10-521, 8/30/13

Continued on page 17

Continued from page 16

Judge Cannot Grant Warrant For Extraterritorial Phone Calls

Defendant was investigated for selling cocaine and marijuana. During the investigation the government obtained a warrant to wiretap a cell phone of the defendant. A DEA agent listening to defendant's conversation over heard him tell someone that he had cocaine in his car, radioed agents, and defendant was arrested for possession of cocaine.

Defendant moved to suppress arguing the wiretaps were invalid because the district court lacked territorial jurisdiction. The warrant was issued by a district court in Mississippi. Defendant's phone was located in Texas at the time and the DEA agent that intercepted his call was listening in Louisiana. The wiretap was issued under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Title III authorizes a federal judge to enter an ex parte order authorizing the interception of communications within the territorial jurisdiction of the court in which the judge is sitting.

The U.S. Court of Appeals for the Fifth Circuit held, "a district court cannot authorize interception of cell phone calls when neither the phone, nor the listening post is present within the court's territorial jurisdiction." The court reversed the denial of the motion to suppress and remanded the case. *United States v. North*, 5th Cir., No. 11-60763, 8/26/13

Affidavit Can Not Expand The Scope Of The Warrant

Defendant was investigated for tax fraud because of discrepancies on his tax return. The government also suspected him of funding an independence movement in Chechnya. Defendant founded the U.S. branch of Al-Haramain Islamic Foundation, a Saudi Arabian charity suspected of funding terrorist activities and Chechen mujaideen.

The government obtained a warrant to seize defendant's computer to search for financial records connected to the tax fraud charges. However, the government then searched the files for evidence support for the terrorist group. Defendant moved to have the evidence supressed asserting that the search exceeded the scope of the warrant. The motion was denied and defendant was convicted.

On appeal, the U.S. Court of Appeals for the Ninth Circuit considered whether the search was unreasonable because of the expanded scope. The Circuit Court held, "The warrant was expressly limited in scope and did not include items such as the records of visits to websites about Chechnya, the communications unrelated to the preparation of the tax return with individuals never named or referenced in the affidavit, or the general background information about the Chechen mujahideen that were seized."

Furthermore, the Circuit Court held "We have never held that an affidavit could expand the scope of a legitimate warrant beyond its express limitations nor do we do so here." The court held, "To the extent the agents wanted to seize relevant information beyond the scope of the warrant, they should have sought a further warrant." The case was remanded to determine what materials should have been excluded and what materials could be included. *United States v. Sedaghaty*, 9th Cir., No. 11-30342, 8/23/13

Non-Custodial Privilege Against Self Incrimination Can't Be Used In Case-in-Chief

Defendant attempted to enter the U.S. with his friend, Uysal, a German citizen who was not allowed to enter because he had previously overstayed a visa. Defendant told border agents that he would return to Toronto so Uysal could return home. The next day defendant again went through the border this time without Uysal. However, later that day Uysal was picked up in a convenience store very close to the boarder on the Canadian side and defendant was arrested in the rest stop just across the border on the U.S. side.

When defendant was arrested the agent asked if he was a U.S. citizen. He replied that he was. The agent then asked why he had made a U-turn to enter the rest area on a specific side. He replied he had to use a bathroom. The agent then warned that lying to a federal agent was a crime and asked whether defendant was there to pick someone up. Defendant responded he wanted a lawyer. He was then arrested.

Before trial, defendant moved to suppress the statements he made to the agent at the rest area. The district court granted the motion, but only with

Continued on page 18

Continued from page 17

respect to "the statements [defendant] made to Agent Boucher after he asked for a lawyer…on the basis they were obtained in violation of Miranda."

On appeal, the U.S. Court of Appeals for the Second Circuit was faced with this question as the Supreme Court has chosen not to answer the question and the Circuits were split. The Second Circuit court held the defendant successfully asserted his privilege to not speak when he asked for a lawyer and that the prosecution could not use the defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief.

The Circuit Court held when "an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt." *United States v. Okatan*, 2d Cir., No. 12-1563-cr, 8/26/13

Excluded Evidence Undermined Jury Verdict

Defendants were charged with 18 U.S.C. § 1014, which criminalizes "knowingly mak[ing] any false statement … for the purpose of influencing in any way the action of any specified private and public entity that provides, or regulates the provision of, financial services; among the entities are federally insured banks." Defendants reported their combined income as the income of the wife solely and only included her on the application on the advice of their mortgage broker. The district court found that because they had signed the paperwork and sent it to the bank they knowingly lied to influence the bank to give them a loan they would otherwise not receive. The district court excluded any exculpatory evidence that they were lied to by their broker and that they did not know the bank's policy.

On appeal, the U.S. Court of Appeals for the Seventh Circuit held, "If the loan applicant doesn't think his falsehood would influence the bank it is unlikely that in making it he intended to influence the bank." Here, the Circuit Court held that the defendants were lied to by their broker about the materiality of the details on the loan. The Circuit Court held, "the erroneous exclusion of evidence favorable to the defendants could thus have been decisive in the jury's decision to convict. The judgment is therefore reversed and the case remanded for a new trial." *United States v. Phillips*, 7th Cir. (en banc), No. 11-3822, 9/4/13

Evidence Of Prior Possession Of Cocaine Admissible

An informant arranged to buy cocaine from a man named Roger, but when the buy occurred a different man arrived to deliver the drugs. The man introduced himself as "Little Maine." The agent watching the buy followed "Little Maine" to the street where defendant and his brother lived. The Agent was informed that "Little Maine" was known to the police as Joshua Kinchen, the defendant.

Before trial, the Government moved to introduce evidence that defendant had prior convictions for possession of cocaine and a statement by defendant that he sold crack cocaine "because he did not know how to do anything else and that he had mouths to feed." The district court held the facts about his possession and statement were admissible, but that the government could not reference his arrest or conviction.

The U.S. Court of Appeals for the Fifth Circuit considered several factors in determining whether the prejudicial effect of the extrinsic evidence substantially outweighs its probative value: (1) the government's need for the extrinsic evidence, (2) the similarity between the extrinsic and charged offenses, (3) the amount of time separating the two offenses, and (4) the court's limiting instructions. After weighing the different factors the court held, "that it was not an abuse of discretion for the district court to conclude that the prejudicial effect of the evidence did not substantially outweigh its probative value. *United States v. Kinchen*, 5th Cir., No. 12-30340, 9/5/13

§ 1035 Does Not Require Defendant To Know It Was Illegal To Make False Statement

After losing his job and health insurance defendant applied for health insurance through the state subsidized

Continued on page 19

Continued from page 18

health care plan. When he applied the application included information about his employment and income and required a pay stub. The application also included a warning that if his circumstances changed he must notify the health care provider. The following year he renewed his plan and indicated he did not have any income. The government presented evidence at trial that he was in fact working for an old high school friend and was being paid in cash.

At trial, the government presented the different elements with jury instructions for each. On appeal, defendant claimed that to convict for a violation of § 1035(a)(2),the government must not only prove that his statements were false and that he knew they were false, but that he also knew that making those false statements was illegal.

The U.S. Court of Appeals for the First Circuit held, "the "willfulness" element does not require the government to prove that the defendant knew it was a crime to make the particular false statement." *United States v. Russell*, 1st Cir., No. 12-1315, 8/26/13

Officials Avoiding Instructions Of Warrant Are Not Absolutely Immune

Appellant filed a 42 U.S.C. § 1983 action against police officers, the District Attorney, and the City of New York after she was arrested and detained based on a material witness warrant. The suit was dismissed by the district court on the grounds that defendants enjoyed absolute immunity. Appellant was confused for her daughter who shares a similar name

and lives in the same apartment. The police thought that the daughter, Alexandra Griffin, had been the last person to see a car reported stolen. To investigate the theft of the car the police sought to speak with Alexandra Griffin, but accidently issued a subpoena for Alexandra Simon, the appellant's mother.

Police arrived at appellant's workplace and arrested her. They brought her to the precinct where she was held, questioned and then released. The next day the officers picked her up at her house at Nine a.m. and brought her back to the precinct, where she was held until Five p.m.

On appeal, appellant claims defendant's should not have been granted absolute immunity. The U.S. Court of Appeals for the Second Circuit agreed holding, "their actions fell outside the protection of the warrant" because they did not bring her before the court as the warrant required. The court also held the arrest and detention were police functions, not prosecutorial functions, and therefore the DA did not qualify for absolute immunity. *Simon v. City of New York*, 2d Cir., No. 11-5386-cv, 8/16/13

Incremental Harm May Be Considered Immanent Harm

Vandiver filed a pro se civil action against the medical personnel of the prison in which he was being held. The defendant claimed he was at risk of partial amputations, blindness, coma and death because he was not receiving the proper care for his chronic illnesses; Hepatitis C and Diabetes. The district court rejected his application concluding the allegations insufficiently alleged imminent danger of serious injury and to overcome the three strikes rule under 28 U.S.C. § 1915(g).

The U.S. Court of Appeals for the Sixth Circuit held, "a plaintiff who alleges a danger of serious harm due to a failure to treat a chronic illness or condition satisfies the imminent-danger exception under § 1915(g), as incremental harm that culminates in a serious physical injury may present a danger equal to harm that results from an injury that occurs all at once." *Vandiver v. Prison Health Services Inc.*, 6th Cir., No. 11-1959, 8/16/13

Specific Consent Is Required For Police To Answer Cell Phone

Border patrol agents noticed defendant driving a car and tapping his breaks, which they thought was signaling for illegal aliens. The agents pulled defendant over and questioned him. During the questioning they asked if they could search the phones that were in the car. Defendant answered yes and the agent took the phones behind the car. Shortly thereafter, the phone rang and the agent answered and represented himself as defendant. The agent received incriminating evidence that defendant was attempting to pick up illegal aliens and arrested

Continued on page 20

Continued from page 19

defendant.

Defendant moved to suppress the evidence obtained by the agent answering the phone. The motion was granted and the government appealed. The U.S. Court of Appeals for the Ninth Circuit held, "As a general matter, consent to search a cell phone is insufficient to allow an agent to answer that phone; rather, specific consent to answer is necessary." The court also held, "An individual who gives consent to the search of his phone does not, without more, give consent to his impersonation by a government agent, nor does he give the agent permission to carry on conversations in which the agent participates in his name in the conduct of criminal activity." *United States v. Lopez-Cruz*, 2013 BL 244755, 9th Cir., No. 11-50551, 9/12/13

Aggravated I.D. Theft Only Requires Transfer Of I.D.

Defendant was arrested for creating counterfeit documents. He created state driver's licenses and handgun permits. He used the customer's actual identity when creating the documents. He was charged with aggravated identity theft and claimed insufficient evidence because the government did not show that anyone's identity had been misappropriated.

The U.S. Court of Appeals for the Seventh Circuit held the statute did not intend to only punish the theft of people's identification, but any unlawful transfer. Here, the court held defendant's actions "entailed an unlawful transfer of another person's means of identification." *United States v. Spears*, 2013 BL 237932, 7th Cir. (en banc), No. 11-1683, 9/6/13

Threats Of School Shooting Are Not Protected By First Amendment

Defendant was a high school sophomore when he sent messages, through MySpace, to his friends that he wanted to commit a school shooting on the same day as Columbine. He told them who was on his hit list and that Hitler was 'our hero'. His friends reported the messages to school officials, who called police and defendant was arrested.

Defendant told the police he had sent the messages, but that he was just kidding. He was then expelled for 90 days by the school board. Defendant then sued the County under 42 U.S.C. § 1983. The district court granted summary judgment for the County.

On appeal, defendant claimed his First Amendment rights were violated because the speech was written off campus. The U.S. Court of Appeals for the Ninth Circuit held the County did not violate his rights because his messages threated the safety of the school and its students, both interfered with the rights of other students and made it reasonable for school officials to forecast a substantial disruption of school activities. The court affirmed the district court's grant of summary judgment. *Wynar v. Douglas Cnty. Sch. Dist.*,2013 BL 230821, 9th Cir., No. 11-17127, 8/29/13

More Thorough Search Of Person Constitutional

A police officer staked out a parking lot awaiting the arrival of Johnson, who was considered armed and dangerous.

Johnson arrived in his van and got out with an associate. The officer got out of his car and told them to stop. Then two more people got out of the van and the officer, feeling in danger, drew his pistol and ordered all four to the ground. When backup arrived, Johnson was searched by the officer and cocaine was found in a sandwich bag. Another officer quickly searched defendant with one hand while pointing a gun at the other suspect.

Then an officer searched defendant more thoroughly looking for weapons. The officer felt a sandwich baggie with something hard in it through defendant's clothes. The officer then investigated why the defendant had blood all over him and found a gun in the van. The defendant told police that he had cleaned the gun after they had committed a robbery.

Defendant moved to suppress the evidence of the cocaine and the gun, but the motion was denied. On appeal, defendant argued the second search of his was unconstitutional and violated his Fourth Amendment rights. The U.S. Court of Appeals held the second search of his person was reasonable and that even if the search was unreasonable, suppression was not justified because the police would have

Continued on page 21

Continued from page 20

discovered the evidence independent of the constitutional violation when they went to investigate the blood. *United States v. Howard*, 2013 BL 232282, 7th Cir., No. 13-1256, 8/30/13

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

November 14-15	COUNTY & DISTRICT ATTORNEYS EXECUTIVE SEMINAR *Annual gathering of County and District Attorneys - in conjunction with UAC*	Dixie Center St. George, UT
November 20-22	ADVANCED TRIAL SKILLS COURSE *For felony prosecutors with 4+ years of prosecution experience*	Hampton Inn West Jordan, UT
April 10-11	SPRING CONFERENCE *Legislative and case law updates, ethics and/or civility and more*	Sheraton Hotel Salt Lake City, UT

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

22 dates and locations around the country	INVESTIGATION AND PROSECUTION OF MORTGAGE FRAUD AND VACANT PROPERTY CRIME *This 2 day course will be held in many different locations throughout the country during 2013 & early 2014* Flyer Full Info Lodging Scholarship Application	
November 11-15	THE EXECUTIVE PROGRAM Registration Brochure *The course designed for prosecution leadership*	Savannah, GA
December 9-13	FORENSIC EVIDENCE Summary Registration Agenda *Comprehensive training on the challenges inherent in violent crime cases involving scientific evidence*	Los Angeles, CA
February 24-28	PROSECUTING HOMICIDE CASES Summary Agenda *Fine tune investigative techniques and enhance your trial skills and your strategic planning*	San Francisco, CA

* For a course description, click on the "Summary" link after the course title. If an agenda has been posted there will also be an "Agenda" link. Registration for all NDAA courses is now on-line. To register for a course, click on the "Register" link. If there are no links, that information has yet to be posted by NDAA.

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